

Assembly Bill No. 1617

Passed the Assembly August 20, 1998

Chief Clerk of the Assembly

Passed the Senate August 12, 1998

Secretary of the Senate

This bill was received by the Governor this ____ day
of _____, 1998, at ____ o'clock __M.

Private Secretary of the Governor

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CHAPTER ____

An act to add Section 43.2 to the Civil Code, and to add Chapter 4.5 (commencing with Section 6400) to Division 7 of Title 1 of the Government Code, relating to religious freedom.

LEGISLATIVE COUNSEL'S DIGEST

AB 1617, Baca. Religious Freedom Protection Act.

(1) The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion and the California Constitution provides that the free exercise and enjoyment of religion without discrimination or preference is guaranteed.

This bill would declare that its purpose is to codify the principle that government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205, and provide a claim or defense to persons whose religious exercise is substantially burdened by government. This bill would prohibit government, as defined, from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except if government demonstrates that application of the burden to the person is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. This bill would permit a person whose religious exercise has been burdened in violation of these provisions to assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. This bill would also make various legislative findings and declarations with respect to these provisions.



(2) Under existing law, each person is afforded various personal rights.

This bill would specify that the free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral. This bill would also provide that laws, regulations, and other governmental actions shall be subject to the Religious Freedom Protection Act.

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares all of the following:

(a) The compelling governmental interest test in the Religious Freedom Protection Act, as added by this act, has been used repeatedly in case law relating to religious liberty and other fundamental rights. It is expected that in applying this standard in cases brought under the Religious Freedom Protection Act, courts will look to that case law, including decisions construing the federal Religious Freedom Restoration Act (42 U.S.C. Sec. 2000bb et seq.). The Religious Freedom Protection Act is not intended to codify or reject the holding or reasoning of any particular case, including cases construing the federal Religious Freedom Restoration Act or any other federal or state statute. However, the Legislature respects the role that persuasive authority and precedent play in the legal system and realizes that courts are influenced in deciding cases by decisions that apply the same standard to similar facts.

(b) Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights. No inference should be drawn that by substituting a new subdivision (d) of Section 6404 of the Government Code, as added by this act, for the subdivision (d) that was adopted in the Assembly on January 15, 1998, that the Legislature intends to further discrimination. Indeed, subdivision (d) of Section 6404 of the Government Code, in its present form, should be read in the context of language in



paragraph (1) of subdivision (b) of Section 6400 of the Government Code, as added by this act, which states that the bill's codification of principles is intended to be consistent with the compelling governmental interest justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205. Cases such as *Wisconsin v. Yoder* have employed a discussion of the rights of third parties in evaluating free exercise claims.

(c) The definition of “exercise of religion” contained in the Religious Freedom Protection Act is intended to reject discussions of centrality in determining whether a practice constitutes an “exercise of religion.” Some courts have engaged in such discussion, while others have not. Discussion of “centrality” improperly involves state intrusion into questions of individual faith. The relevant inquiry is whether a practice is substantially motivated by a sincerely held religious belief. While both traditional and nontraditional believers have been improperly scrutinized under the centrality test, often it has been adherents of nontraditional or unfamiliar minority faiths whose claims have been barred by discussions of centrality.

SEC. 2. Section 43.2 is added to the Civil Code, to read:

43.2. (a) Free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral.

(b) Laws, regulations, and other governmental actions shall be subject to Chapter 4.5 (commencing with Section 6400) of Division 7 of Title 1 of the Government Code.

SEC. 3. Chapter 4.5 (commencing with Section 6400) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 4.5. RELIGIOUS FREEDOM PROTECTION ACT

6400. (a) The Legislature hereby finds the following:



(1) The framers of the United States Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the United States Constitution.

(2) The framers of the California Constitution, recognizing free exercise and enjoyment of religion without discrimination or preference as an inalienable right, guaranteed this right under Section 4 of Article I of the California Constitution.

(3) The State of California has independent authority to protect the free exercise of religion by principles that are separate from, complementary to, and more expansive than the First Amendment to the United States Constitution.

(4) The Legislature, under its police powers, may create statutory protections that codify and supplement rights guaranteed by the California Constitution.

(5) Laws facially neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.

(6) Government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification.

(7) In certain circumstances, courts have found health, safety, antidiscrimination, and other concerns to constitute compelling governmental interests.

(8) Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights. No inference should be drawn that by substituting a new subdivision (d) of Section 6404 of the Government Code, as added by this act, for the subdivision (d) that was adopted in the Assembly on January 15, 1998, that the Legislature intends to further discrimination. Indeed, subdivision (d) of Section 6404 of the Government Code, in its present form, should be read in the context of language in paragraph (1) of subdivision (b) of Section 6400 of the Government Code, as added by this act, which states that the bill's codification of principles is intended to be

consistent with the compelling governmental interest justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205. Cases such as *Wisconsin v. Yoder* have employed a discussion of the rights of third parties in evaluating free exercise claims.

(9) In enacting this act, the Legislature recognizes the importance of protecting the health, welfare, and safety of children. In evaluating free exercise rights, cases such as *Wisconsin v. Yoder* (1972) 406 U.S. 205 have evaluated whether a sincerely held religious practice results in harm to the physical or mental health of a child. This approach is consistent with Section 300 of the Welfare and Institutions Code and following, other laws relating to child abuse and neglect, laws relating to the reporting of child abuse and neglect, and the interpretation of those statutes.

(10) It is anticipated by the Legislature that in interpreting this act, courts will continue to give appropriate respect to the experience and expertise of correctional professionals in maintaining security and safety. See, for example, *May v. Baldwin* (9th Cir. 1997) 109 F.3d 557. The standard in this act does not require a choice between correctional security and safety and free exercise rights. However, the act does require that diligent efforts be made to accommodate both interests. Properly applied, the standard does not require correctional officials to place any person's life or safety at risk or to jeopardize correctional security. As cases such as *May v. Baldwin* note, the standard does not require prison officials to speculate about alternatives not readily apparent. However, correctional regulations and policies grounded on mere speculation do not meet the act's requirements (see *May v. Baldwin* (9th Cir. 1997) 109 F.3d 557, at pages 564-565). As examples of how the standard has been applied to respect this balance, see *Campos v. Coughlin* (S.D. N.Y. 1994) 854 F.Supp. 194, and *Sasnett v. Sullivan* (7th Cir. 1996) 91 F.3d 1018, in which the court held that prison security is a compelling interest, but rejected a regulation because it was not a



serious and measured response to a concern with violence, and *Abdur-Rahman v. Michigan Dept. of Corrections* (6th Cir. 1995) 65 F.3d 489, in which the court noted that while inmates retain their First Amendment right to exercise their religion, the right may be subjected to reasonable restrictions and limitations.

(11) The Legislature finds that while the government's compelling interest in protecting its citizens will often be sufficient to overcome religious justifications in criminal actions, in other circumstances courts have recognized the principle of accommodation of sincerely held religious practices in a criminal action where to do so does not materially interfere with the rights of third parties or the public safety, peace, order, or welfare. See, for example, *People v. Woody* (1964) 61 Cal.2d 716 and *Wisconsin v. Yoder* (1972) 406 U.S. 205. The Legislature believes that the criminal justice system will have the ability to distinguish legitimate requests for the accommodation of sincerely held religious practices from justifications advanced for the mere purpose of avoiding the enforcement of criminal laws. See, for example, *People v. Woody* (1964) 61 Cal.2d 716, *Leary v. United States* (5th Cir. 1967) 383 F.2d 851, *U.S. v. Bauer* (9th Cir. 1996) 84 F.3d 1549, and *U.S. v. Meyers* (D. Wyo. 1995) 906 F.Supp. 1494, affirmed (10th Cir. 1996) 95 F.3d 1475.

(b) The purposes of this chapter are the following:

(1) To codify the principle that government should not substantially burden religious exercise without compelling justification, and then only by the least restrictive means consistent with that compelling justification, as set forth in *People v. Woody* (1964) 61 Cal.2d 716, *Sherbert v. Verner* (1963) 374 U.S. 398, and *Wisconsin v. Yoder* (1972) 406 U.S. 205.

(2) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

6401. This chapter shall be known and may be cited as the "Religious Freedom Protection Act."



6402. (a) Free exercise of religion is a substantive right that applies in this state even in instances where laws, regulations, or other governmental actions are facially neutral.

(b) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subdivision (c).

(c) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both of the following:

(1) In furtherance of a compelling governmental interest.

(2) The least restrictive means of furthering that compelling governmental interest.

(d) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

6403. As used in this chapter:

(a) "Demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(b) "Exercise of religion" means an act or refusal to act that is substantially motivated by sincerely held religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

(c) "Government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the state or a political subdivision of the state.

(d) "Person" for the purposes of this section includes an individual, partnership, association, corporation, organization, or any other combination thereof.

(e) "Political subdivision of the state" for the purposes of this section includes a county, city, whether general law or chartered, city and county, school district, municipal corporation, or district, or any board, commission, or agency thereof, or any other local public agency.



6404. (a) This chapter applies to all state law, and the implementation of that law, whether statutory or otherwise, and to all laws, ordinances, regulations, and governmental actions in this state, whether adopted before or after the effective date of this chapter.

(b) This chapter applies to all cities, including charter cities. The Legislature finds and declares that free exercise of religion is a matter of statewide concern and is not merely a municipal affair or a matter of local interest.

(c) Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(d) Nothing in this chapter shall be construed to require that religious liberty claims always prevail over, or always be subordinate to, other civil or constitutional rights.

(e) To the extent this chapter creates new rights to monetary damages, nothing in this chapter shall be construed to allow the imposition of monetary damages on any state or local governmental entity for acts occurring prior to January 1, 1999.

(f) When a claim or defense is asserted by a person under this chapter, the question of whether the person's religious belief is sincerely held is a question of fact. All other questions involve questions of law, including whether the law, regulation, or other governmental action substantially burdens the person's exercise of that religion, and whether application of that burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

6405. Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the United States Constitution and Section 4 of Article I, Section 8 of Article IX, and Section 5 of Article XVI of the California Constitution, prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions to the extent permissible under the United States and California Constitutions shall not constitute a violation of

this chapter. As used in this section, “granting” used with respect to government funding, benefits, or exemptions does not include the denial of government funding, benefits, or exemptions.

6406. The provisions of this chapter are severable. If any portion of this chapter should be declared invalid by a court of competent jurisdiction, it is the intent of the Legislature that the other provisions of this chapter remain in effect.



Approved _____, 1998

Governor

